

**LEGISLATIVE SERVICES AGENCY
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FISCAL IMPACT STATEMENT

LS 6651

BILL NUMBER: HB 1291

NOTE PREPARED: Mar 19, 2007

BILL AMENDED: Mar 12, 2007

SUBJECT: Appointment of Special Prosecutors.

FIRST AUTHOR: Rep. Van Haaften

FIRST SPONSOR: Sen. Bray

BILL STATUS: As Passed Senate

FUNDS AFFECTED: X **GENERAL**
DEDICATED
FEDERAL

IMPACT: State & Local

Summary of Legislation: (Amended) This bill has the following provisions:

- A. It requires a court to appoint a special prosecutor if: (1) a previously appointed special prosecutor files a motion to withdraw as special prosecutor or has become incapable of continuing to represent the interests of the state; and (2) the court finds that the facts that established the basis for the initial appointment of a special prosecutor still exist. It makes numerous changes to the law concerning the compensation of special prosecutors.
- B. It permits a prosecuting attorney to establish a youth mentoring program as a tax-exempt organization and receive charitable contributions, appropriations, and grants to establish or administer the program. It requires the prosecuting attorney to make an annual report to the county fiscal body concerning the youth mentoring program, and provides that the youth mentoring program is subject to audit by the State Board of Accounts.
- C. It increases the compensation paid to a senior judge from \$50 to \$100 for the first 30 days of service, and from \$200 to \$250 for each day of service after the 30th day.

Effective Date: July 1, 2007.

Explanation of State Expenditures: (Revised) *Senior Judge Compensation* – This provision could increase expenditures for senior judges by \$71,000 to \$270,000, depending on the amount that the Supreme Court would authorize for the compensation rate for senior judges. Senior judge per diem is paid out of the Judges Salary Account (1000/100260). The free balance at the end of FY 2005 and 2006 are shown in the following table.

Free Balance At End of Fiscal Year for Judges Salary Account (1000/100260)	
<u>2005</u>	<u>2006</u>
\$154,537	\$358,854

Background: Senior judges are individuals who have formerly served as trial court judges in Indiana. They are certified by the Indiana Judicial Nominating Commission and may be appointed if requested by a trial court to assist in a certain number of cases.

By statute, a senior judge is entitled to the following per diem compensation:

- \$50 per day for the first 30 days of service in a calendar year;
- \$200 per day from the 31st day up to a maximum of 100 calendar days.

By order of the Supreme Court, senior judges receive the following compensation:

- \$50 per day for the first 30 days of service in a calendar year;
- \$100 per day from the 31st day through the 74th calendar day,
- \$125 per day for the 75th through the 100th day of service.

Senior judges also receive reimbursement for mileage and reasonable expenses incurred in performing service as a senior judge, including but not limited to meals, lodging, and health insurance. Senior judges can serve a maximum of 100 days. This portion of the bill would not affect any of these benefits.

The number of senior judges has remained between 77 and 84 between 2003 and 2006.

Total Number of Senior Judges Receiving Benefits by Calendar Year			
<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>
81	77	84	77

The trend in the number of days worked has declined between 2003 and 2006.

Total Number of Senior Judge Days Served by Calendar Year					
	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>4-year average</u>
Days 1 through 30	4,752	2,720	2,474	2,287	3,058
Days 31 through 74	262	1,068	899	928	789
Days 75 through 100	—	—	28	76	52
Total Days Served	5,014	3,788	3,401	3,291	3,874

The following table compares what current law allows for per diem compensation with the per diem

authorized by the Indiana Supreme Court.

Comparing Per Diem Payments for Senior Judges			
	<u>Current Law</u>	<u>Authorized by Supreme Court</u>	<u>Percent</u>
Days 1 Through 30	\$50	\$50	100%
Days 31 through 74	\$200	\$100	50%
Days 75 through 100	\$200	\$125	63%

The estimated expenditures will depend on the per diem amount that the Supreme Court authorizes and the number of days worked by senior judges. To estimate this net increase, a range is used. The range is based on a four-year average of the number of days worked multiplied by a per diem that is the percentage of the proposed amount as a low increase and the entire new per diem as the maximum increase.

	<u>4-Year Ave.</u>	<u>% of per Diem</u>	<u>Per Diem Based on %</u>	<u>Low Estimate Based on % of Judges</u>	<u>High Estimate Based on Proposed per Diem</u>
Days 1 through 30	3,058	75%	\$75	\$229,350	\$305,800
Days 31 through 74	789	50%	\$100	\$78,900	\$197,250
Days 75 through 100	52	63%	\$158	\$8,190	\$13,000
Total Amount				\$316,440	\$516,050

The estimated net increase is based on the difference between the reported four-year average of the estimated expenditures shown in the table above.

Per Diem Expenditures				
<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>4-year average</u>
\$321,895	\$234,675	\$215,925	\$209,600	\$245,524

The net increase for senior judge per diem payments could be between \$70,000 and \$270,526.

Added Expenditures for Senior Judge Per Diem Payments					
	<u>New Expenditures</u>		<u>Four Year Average</u>		<u>Net Increase</u>
Low Estimate	\$316,440	-	\$245,524	=	\$70,916
Maximum Estimate	\$516,050	-	\$245,524	=	\$270,526

Explanation of State Revenues:

Explanation of Local Expenditures: (Revised) *Youth Mentoring Program* – The bill provides that a prosecuting attorney may establish and administer a youth mentoring program. The Marion County Prosecuting Attorney's Office has sponsored a youth mentoring program since 2003 named "Mentoring Youth, Kids Improving Directions" (MYKID). MYKID matches one adult mentor with three students who meet twice a month during the regular school day on the respective school campus. The curriculum used is "Talks My Father (Mother) Never Had With Me" by Dr. Harold Davis and Dr. Ollie Watts Davis. The program involves pairing an attorney or support staff in the Prosecuting Attorney's Office with three grade school students in a school in Marion County. Currently, the program serves about 100 students. The current budget for MYKID is estimated at \$5,000. Funding originally came from federal grants, but is currently underwritten by private sponsors. The prosecuting attorney is to provide an annual report to the county fiscal body about the program. The program would also be subject to an audit by the State Board of Accounts.

Explanation of Local Revenues: *Appointments of Special Prosecutors* – Under current law, a circuit or superior court is required to appoint a special prosecutor when any person other than the prosecuting attorney or the prosecuting attorney's chief deputy files a verified petition requesting appointment of a special prosecutor and the prosecuting attorney agrees. The court may also appoint a special prosecutor if one of three circumstances occur:

1. The person files a verified petition requesting the appointment of a special prosecutor and the court finds clear and convincing evidence that the appointment is necessary;
2. If the prosecuting attorney files a petition to request a special prosecutor;
3. An elected public official is a defendant in a criminal proceeding.

There are two types of special prosecutors: (1) those who are currently employed as a prosecuting attorney in another county and (2) those who have been employed for at least 8 years as a prosecuting attorney or chief deputy and have filed an affidavit requesting designation as a senior prosecuting attorney.

The following table compares and contrasts some of the differences between these two.

<u>Type of Officer</u>	<u>Special Prosecutor</u>	<u>Senior Prosecuting Attorney</u>
Qualifications	<u>Currently</u> employed as prosecuting attorney or a deputy prosecuting attorney in a county other than the county in which the person is to serve as special prosecutor	<u>Was</u> employed for at least 8 years as prosecuting attorney or chief deputy prosecuting attorney; must file affidavit requesting designation as a senior prosecuting attorney in circuit court of county in which the person is willing to serve
Compensation	\$433 per day	Combination of payments and retirement benefits may not exceed the minimum compensation to which a full-time prosecuting attorney is entitled

This bill addresses the problem of when a special prosecutor is unable to continue representing the state in a criminal case. Reasons that special prosecutors may not be able to continue in a case include creation or discovery of their own conflict in a case, death, retirement, or because the prosecutor has been elected to a judgeship. Under current law, if the special prosecutor voluntarily withdraws from the case and a new special

prosecutor is not appointed, the statute of limitations on the case may expire and the case in question would be dismissed by the court. If a court is required to appoint a new special prosecutor, then the county would be required to pay \$433 per day if a prosecuting attorney from another county serves as a special prosecutor or \$335 a day if a chief deputy is appointed.

Compensation of Special Prosecutors -- Special prosecutors are paid on a daily rate, currently \$415.65, based on an annual salary of \$115,282 and a 277-day year. This bill would allow these special prosecutors to be paid at an hourly rate and would specifically permit the court to pay for reasonable costs of investigation, discovery, and secretarial work. There are reportedly some instances when both senior and special prosecutors have had to pay in advance for coroner reports and depositions and were uncertain whether they were reimbursed by the court for these expenses. Counties could save money if a special prosecutor spends less than a full day on a criminal case but receives the full per diem. The hourly rate would be \$55.42.

Appointment of Senior Prosecuting Attorneys – Under current law, former prosecuting or deputy prosecuting attorneys who wish to work as senior prosecuting attorneys are required to file an affidavit in the circuit court of the county in which they wish to work. This bill would also require these senior prosecuting attorneys to also file in each superior court in a county as well as the circuit court. This should not affect county expenditures but would ensure that superior court judges would know about the availability of a senior prosecuting attorney in the county.

Compensation of Senior Prosecuting Attorneys – Under current law, compensation for senior prosecuting attorneys may not be more than the per diem paid for a full-time prosecuting attorney. This bill would also allow senior prosecuting attorneys to be paid on an hourly rate. Counties would save money if they can pay senior prosecuting attorneys by the hour rather than by the day. Since senior prosecuting attorneys are also considered a form of special prosecutor, they would also be eligible for reimbursement of expenditures made for investigation, discovery, or secretarial work.

This bill also would increase the number of days that senior prosecuting attorneys can work and be paid if they are currently not receiving retirement benefits. There are reportedly some senior prosecuting attorneys who are not drawing retirement who have had more opportunities for appointments than they could accept because of the 100-day limit.

State Agencies Affected: State Board of Accounts.

Local Agencies Affected: Trial courts with criminal jurisdiction; Office of Prosecuting Attorneys.

Information Sources: Tom Carusillo Director, Trial Court Services, Indiana Supreme Court Division of State Court Administration; *Indiana Judicial Reports, 2003 through 2005*; Auditor of State Data Base; Michael Dvorak, St. Joseph County Prosecuting Attorney; Steve Johnson, Prosecuting Attorneys Council; Marion County Office of Prosecuting Attorney.

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